

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





**BRIEF FOR APPELLANT  
AND JOINT APPENDIX**

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IN THE  
**United States Court of Appeals**

DISTRICT OF COLUMBIA

*United States Court of Appeals  
for the District of Columbia*

No. 9393 **FILED** MAR 21 1947

GARFIELD I. KASS, *Appellant,*

v.

EMANUEL BASKIN, *Appellee.*

*Joseph W. L. L. L.*

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**522**

**Appeal from the Municipal Court of Appeals for the  
District of Columbia.**

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IN THE  
**United States Court of Appeals**

DISTRICT OF COLUMBIA

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No. 9393

---

GARFIELD I. KASS, *Appellant*,

v.

EMANUEL BASKIN, *Appellee*.

---

Appeal from Judgment of the Municipal Court of Appeals  
For the District of Columbia.

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**BRIEF FOR APPELLANT.**

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**JURISDICTIONAL STATEMENT.**

By his original complaint filed in the trial court (App. 2), plaintiff-landlord, appellant herein, sought possession of certain commercial real property from the defendant-tenant, appellee herein. Jurisdiction of landlord and tenant actions for possession is in the Municipal Court for the District of Columbia. D. C. Code (1940) Title 11, Secs. 735-737; Act of Mar. 3, 1901, ch. 854, secs. 20-22 (31 Stat. 1193).

From an adverse decision in the trial court (App. 7) defendant prosecuted an appeal of right to the Municipal Court of Appeals for the District of Columbia, pursuant to D. C. Code (1940) Title 11, Sec. 772; Act of Apr. 1, 1942, ch. 207, sec. 7, (56 Stat. 195). The Municipal Court of Appeals reversed the trial court (App. 18) and plaintiff filed a petition with this Court for allowance of an appeal and on January 9, 1947, by order of this Court the petition for allowance of an appeal was granted pursuant to D. C. Code (1940) Title 11, Sec. 773; Act of Apr. 1, 1942, ch. 207, sec. 8, (56 Stat. 196).

### **STATEMENT OF CASE.**

On March 11, 1946, a Landlord and Tenant complaint and summons were filed in the trial court by the plaintiff, seeking possession of commercial property because of defendant's breach of a covenant against subletting (App. 2). The time for the appearance of the defendant was stated in the summons to be March 25, 1946 (App. 3). On this return date, March 25, 1946, Henry S. Snyder, a member of the Bar of the District of Columbia, filed a praecipe entering his appearance as attorney for defendant (App. 4) and he then continued the case to April 1, 1946 for trial (App. 18) (see Rule 9(a) of the Landlord and Tenant Rules quoted herein on page 4). He did not request the court to extend the time within which to file a jury demand as prescribed by Landlord and Tenant Rule 7 (a). On March 29, 1946, four days later, Snyder and two other attorneys joined as counsel for defendant in filing an answer containing a jury demand (App. 4), and also filed a motion for a jury trial (App. 5, 6) with an affidavit in support thereof (App. 6), and calendared the motion for hearing on April 1, 1946 (App. 6), the date to which the case had been continued for trial by Snyder.

The trial judge listened to "all the circumstances presented" (App. 11) and overruled the motion for a jury trial (App. 7). Thereafter when the case was called for trial,



counsel for defendant had a preliminary colloquy with the Court in an endeavor to get the court to sign an opinion prepared by defendant's counsel, which the court refused to sign because it did not adequately express his views (App. 10-12). Those views have, however, been fully and explicitly set forth by the trial judge in an opinion filed by him in *Bell v. Westbrook*, L. & T. No. 108281, shortly after the Municipal Court of Appeals rendered the decision from which the present appeal has been allowed. This opinion has been published in the Washington Law Reporter at 74 W. L. R. 1171.

The case was then tried by the court and resulted in a finding and judgment for plaintiff on the merits for possession of the property involved (App. 7, 9).

Upon appeal, the Municipal Court of Appeals reversed the trial court on the ground that the trial court's action in denying the motion for jury trial was an abuse of discretion because no prejudice was shown by the plaintiff (App. 13-18).

### **STATUTE AND RULES INVOLVED.**

D. C. Code (1940) Title 11, Sec. 722; Act of March 3, 1921, ch. 125, sec. 11 (41 Stat. 1312):

"The said municipal court, sitting in banc, shall have power to prescribe fees and costs, including the fee to be paid for a jury trial, to make rules of practice, pleading, and procedure, not inconsistent with law, and to modify and change the same from time to time, to insure the proper administration of justice. \* \* \*"

Rules of the Municipal Court for the District of Columbia, Landlord and Tenant Branch:

No. 7. "(a) Any party entitled to a jury trial and desiring same shall file a demand for such jury trial, signed by the party or his attorney of record, accompanied by the fee herein provided, or, in the absence of such payment, upon a waiver thereof by the judge. Such demand shall be filed not later than the time for appearance of the defendant stated in the notice, or

such extended time as the judge may fix by special order in the case, and, if made by the defendant, must be accompanied by an answer of the defendant or his agent setting out the facts upon which his defense is based.

“(b) When a demand for jury trial has been filed as above provided, the case shall be placed upon the regular jury assignment for trial under the procedure provided for jury trials, and shall be given a preferential status on said jury assignment.”

No. 9. “(a) Time of Trial. The trial shall be held on the return day, except that for good cause shown, the trial of said cause may be set by the judge for a later day. \* \* \*”

### STATEMENT OF POINTS.

1. A comparison of the reasons which led the trial judge to deny a jury trial, as stated by him in *Bell v. Westbrook*, supra, with the reasons stated by the Municipal Court of Appeals for treating that denial as an abuse of discretion, will demonstrate conclusively that the Municipal Court of Appeals, and not the trial judge, is the one truly chargeable with an abuse of discretion.

2. The Municipal Court of Appeals erred in holding that the trial court abused its discretion in failing to grant defendant's motion for a jury trial.

3. The Municipal Court of Appeals erred in failing to follow the adjudicated cases and in reversing the judgment of the trial court.

### SUMMARY OF ARGUMENT.

#### I.

Rule 7 (a) of the Landlord and Tenant Rules of the Municipal Court for the District of Columbia has been completely emasculated and scrapped by the opinion of the court below, and, in practical effect, has been interpreted by that court to mean that a litigant, at any time prior to the actual commencement of trial, has the right to demand and



obtain a jury trial, providing that the opposing party is unable to carry the burden of proving that prejudice therefrom may result to him.

## II.

(a) The constitutional guarantee of a *right* to a jury trial can be waived by failure to comply with reasonable conditions.

(b) The decision of the Municipal Court of Appeals is contrary to the principle of law announced by the Supreme Court of the United States in the cases of *Bank of Columbia v. Okely*, 4 Wheaton 235, 4 L. ed. 559 and *Fidelity and Deposit Company of Maryland v. United States*, 187 U. S. 315, 47 L. ed. 194, and also announced by this Court in the cases of *Columbia Laundry Co. v. Ellis*, 36 App. D. C. 583; *Davidge v. Simmons*, 49 App. D. C. 398, 298 F. 1018; *May v. Melvin*, 78 U. S. App. D. C. 368, 141 F. (2d) 22; *Kennedy v. David*, 71 App. D. C. 340, 109 F. 2d 676, and *Barrett v. Sterrett Operating Service*, 66 App. D. C. 321, 87 F. 2d 224; and also announced by the court in *McNabb v. Kansas City Life Ins. Co.*, 139 F. (2d) 591;

(c) The decision of the Municipal Court of Appeals is contrary to the weight of authority of the highest courts of many of the States.

## ARGUMENT.

### I.

The opinion filed by the trial judge in *Bell v. Westbrook*, *supra*, contains a comprehensive and scholarly discussion of the questions presented on this appeal. The Court's attention is respectfully invited to this masterful opinion as a better statement of the reasons for reversing the decision here under review than is perhaps presented herein; and we respectfully submit that a mere reading of both this opinion and that of the Municipal Court of Appeals in the present case will suffice to demonstrate the necessity for a reversal



of the latter. This brief, therefore, attempts only to refer more exhaustively than the trial judge considered appropriate in a *nisi prius* opinion, to the many cases in the many jurisdictions which uniformly sustain the decision of the trial judge and to present some of the salient points in favor of sustaining that decision here, and reversing the decision of the Municipal Court of Appeals.

## II.

(a) The right to a jury trial was waived by the failure of the defendant to comply with the reasonable conditions imposed by Rule 7 of the Landlord and Tenant Rules. *Bank of Columbia v. Okely, supra, May v. Melvin, supra; McNabb v. Kansas City Life Ins. Co., supra; Kennedy v. David, supra.*

The Municipal Court of Appeals held that the test is whether or not prejudice can be shown by the adversary party, and cites authorities in support of this proposition. The authorities cited by that Court, however, do not support the decision appealed from.

Rule 7 (a), *supra*, provides that a party entitled to a jury trial and desiring same shall file a demand for such jury trial, signed by the party or his attorney of record, and that *such demand shall be filed not later than the time for appearance of the defendant stated in the notice*, or such extended time as the judge may fix by special order in the case.

The power of the Municipal Court to make rules of practice, pleadings and procedure is derived from Congress. Title 11, D. C. Code (1940) Sec. 722; Act of March 3, 1921, ch. 125, sec. 11 (41 Stat. 1312).

A rule of court made under authority of Congress has the force and effect of law. *In re Williams*, 54 App. D. C. 65, 294 Fed. 996; *Murphy v. Gould*, 39 App. D. C. 363, in which case this Court stated:

“Instead of enacting a statute completely regulating the practice of the supreme court of the District, Congress invested that court with the power to establish

such other rules as it may deem necessary for regulating the practice of the court. D. C. Rev. Stat. sec. 770. See also Code, sec. 73 (31 Stat. at L. 1201, Chap. 854). The same power is conferred upon this court with respect to the transaction of the business brought before it, and the time and method of entering and giving notice of appeals. Sec. 6 of the act establishing the court of appeals, approved February 9, 1893; Code, Sec. 225 (31 Stat. at L. 1225, chap. 854). *These rules 'have the force of law, and are binding upon the court, and upon the suitors, and those who represent suitors.' They cannot be dispensed with by the court to meet the hardship of a particular case.* District of Columbia v. Roth, 18 App. D. C. 547-551; Talty v. District of Columbia, 20 App. D. C. 489-491; United States ex rel. Mulvihill v. Clabaugh, 21 App. D. C. 440-443; District of Columbia v. Humphries, 11 App. D. C. 68-78." (Emphasis supplied)

To like effect are the following cases:

*Rio Grande Irrigation Co. v. Gildersleeve*, 174 U. S. 608, 43 L. ed. 1103;

*Judd & Detweiler v. Giddings*, 43 App. D. C. 304, 311;

*In re Hitchcock*, 47 App. D. C. 251;

*Nealon v. Davis*, 57 App. D. C. 133, 18 F. 2d 175;

*D. C. v. Roth*, 18 App. D. C. 547, 55;

*Johnson-Wynne Co. v. Wright*, 28 App. D. C. 375.

The trial court was bound by the language of the rule and had no authority to refuse to follow it and grant the defendant's motion for jury trial. *Rio Grande Irrigation Co. v. Gildersleeve*, *supra*; *Clawans v. Whiteford*, 60 App. D. C. 412, 55 F. (2d) 1037. Rules of court were made to be obeyed and he who disregards them does so at his peril. *Doyne v. Erner*, 48 App. D. C. 254; *In re Hitchcock*, *supra*.

Having the force and effect of law, Rule 7, *supra*, could no more be broadened or enlarged in scope than could the statute of limitations, statute of frauds, or any other statute or rule of court.

The construction of Rule 7 aforesaid, as stated in the opinion of the court below, leaves the trial judges in the



Municipal Court no discretion whatever but to grant every jury demand, no matter how untimely filed, and regardless of the status of the case on the trial calendar, whenever the opposing party cannot establish that such jury trial would prejudice him. If this is the intent of the Municipal Court of Appeals, then the rule could better be redrafted to read as follows: "A jury trial may be had by application therefor at any stage of the proceedings prior to trial, unless the adversary party affirmatively establishes that the granting of same would prejudice him."

Rule 7 in its present form and the construction given it by the Municipal Court of Appeals aforesaid cannot stand together in the light of the adjudicated cases.

Every case in the Landlord and Tenant division of the Municipal Court is deemed to be ready *for trial* on the return day. (Rule 9(a), *supra*.) The instant case was initially returnable on March 25, 1946. It was continued by the defendant for one week and the new return date was April 1, 1946. According to Rule 9(a) the trial was to be had on April 1, 1946. No "calendar" of cases is kept in the Landlord and Tenant division of the Municipal Court and all continued cases with the same return dates are placed together and called for trial together on the new return date. Hence, defendant's motion, calendared for hearing on the same date to which the case had been continued for trial four days before, obviously delayed the trial. The Municipal Court of Appeals held this did not constitute prejudice in a possessory action.

The effect of the opinion of the Municipal Court of Appeals has been a tendency on the part of many attorneys to file jury demands regardless of the fact that the limited time prescribed by Rule 7 may long since have gone by. These attorneys offer the argument that the opposing party can show no prejudice other than a delayed trial date. The decision of the Municipal Court of Appeals supports the argument that this does not constitute prejudice. (Statistics cited by the trial court in *Bell v. Westbrook*, *supra*, are especially significant in this connection). An illustration



of the aforementioned tendency is found in this same Bell case, wherein a jury trial was sought more than six months after the time to request same had elapsed under the Rule, and the effect of the decision complained of herein, that is, no showing of prejudice, was expressly cited as authority for the right to a jury trial.

The Seventh Amendment to the Constitution of the United States provides:

“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.”

It is certain that the wording of the Seventh Amendment does not guarantee that the trial *shall* be by jury, but does provide that *the right* of trial by jury shall be preserved. *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873; *Fidelity & Deposit Co. of Md. v. U. S.*, *supra*.

(b) In *Bank of Columbia v. Okely*, *supra*, the Supreme Court of the United States stated:

“But a power is reserved to the judges to *make such rules and orders* ‘as that justice may be done;’ and as the possession of judicial power imposes an obligation to exercise it, we flatter ourselves that in practice the evils so eloquently dilated on by the counsel do not exist. *And if the defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered to him by the act, it is presumable that he cannot dispute the justice of the claim.* That this view of the subject is giving full effect to the seventh amendment to the constitution, is not only deducible from the general intent, but from the express wording of the article referred to. Had the terms been, that ‘the trial by jury shall be preserved,’ it might have been contended that they were imperative, and could not be dispensed with. But the words are, that the right of trial by jury shall be preserved, which places it on the foot of a *lex pro se* intro-

ducta, and the benefit of it may therefore be relinquished." (Emphasis supplied)

The Supreme Court of the United States in the foregoing case makes no reference to possible prejudice to the adversary party, and the Municipal Court of Appeals, although reference was made to said case both in plaintiff's brief filed in that court and in his motion for modification or rehearing, failed to cite, distinguish, discuss or compare it. This Court, however, cited that case with approval as recently as 1940 in *Kennedy v. David, supra*.

The decision of the Municipal Court of Appeals is contrary to the opinions of this Court in *May v. Melvin, supra*; *Kennedy v. David, supra*; *Barrett v. Sterrett Operating Service, supra*; and *McNabb v. Kansas City Life Ins. Co., supra*.

In *May v. Melvin, supra*, Rule 38 of the Federal Rules of Civil Procedure, providing for the manner of obtaining a jury trial in the District Court, was discussed. While that rule (38(d)) expressly provides that failure to timely demand a jury trial effects a waiver thereof, the same applies to Landlord and Tenant Rule 7, in view of the language of *Bank of Columbia v. Okely*, above, viz., that failure to comply with reasonable conditions effects a waiver of the right to a jury trial.

In *Kennedy v. David, supra*, the precise jury trial rule of the Municipal Court was involved. There, as here, the case was continued on the first return date without a jury trial demand being filed or the time extended for filing same. There, as here, the demand was filed late. (The Municipal Court of Appeals cites the fact that the demand in the Kennedy case was a month late, and here but four days late, but the Municipal Court of Appeals attempts to draw no line, if indeed one can be drawn, leaving the entire situation in a state of conjecture and confusion.) There, as here, the case was regularly assigned on the list of cases to be heard without a jury on a day certain. There, as here, the demand was served on opposing counsel two days be-



fore trial. There, as here, the demand was renewed when the case was called for trial on the actual trial date. There, as here, the trial judge sustained plaintiff's objection to the demand on the ground that the rule had not been complied with. There, as here, there was a finding for plaintiff. But there, the similarity stops. There, this Court held *the defendant had waived his right to a jury trial because*, "It has long been settled that a right to a jury trial in a civil action may be waved by failure to comply with reasonable conditions. *Bank of Columbia v. Okely*, \* \* \*." Here, the Municipal Court of Appeals held that defendant was entitled to a jury trial because "there was neither showing or finding of prejudice to plaintiff."

It might be noted that the court below attempts to distinguish the Kennedy case by showing that plaintiff failed to meet the allegations of an affidavit filed by the attorney for defendant who failed to originally request or reserve a jury trial. But the affidavit contained matter peculiarly within the minds of the attorney and the defendant which, obviously, cannot be contradicted unless access could be had into the minds of these parties for refutation.

*Barrett v. Sterrett Operating Service, supra*, is best summarized by this Court in the Kennedy case in the following language:

"\* \* \* a defendant in a Class B case in the Municipal Court had moved for a jury trial on the return day, a few minutes after the hour named in the summons. The Municipal Court overruled the demand, and the plaintiff recovered judgment. This court reversed the judgment, on the ground among others that it was 'perfectly clear that the granting of the motion for jury trial would not have interfered with the orderly disposition of the court's docket or have deprived the opposing litigant of any rights.' That cannot be said here. A few minutes delay, during which no substantial action is taken by the court or the opposing litigant, is one thing; a delay of more than a month, during which the case is set for trial on the non-jury docket and the opposing litigant presumably prepares his case on that basis, is a very different thing."



The delay here was of four days' duration, but the same situation existed as in the Kennedy case, viz., the setting of the case for trial on the non-jury calendar and the presumptive preparation of the case for trial on that basis. And, more important than the situation in the Kennedy case, the instant action involved an action for possession of real property, wherein time is always of the essence.

(c) To secure a trial by jury in a civil action it must be demanded, and a party who fails to make such demand will be held to have waived his right and cannot afterwards object that the case was tried without a jury. It is sometimes expressly provided by statute or the constitution of a state that the failure to demand a jury shall be deemed a waiver, or that the trial shall be without a jury unless a jury is demanded; and a statute which provides that the trial shall be by jury if demanded impliedly authorizes a trial without a jury if no demand is made (*Blakenship v. Nimmo*, 50 Ala. 506; *Gibbon v. Thompson*, 21 Minn. 398; *State v. King Co.*, 106 Wash. 619, 180 P. 875).

It is sometimes provided by statute or rule of court that a party desiring a jury trial must file a notice to the effect that a jury will be demanded a certain number of days before the commencement of the term at which the case is to be tried (*Doll v. Anderson*, 27 Cal. 248); or before the time fixed for trial (*Consolidated Gas, etc., Engine Co. v. Blanda*, 90 N. J. L. 135, 100 A. 334), or before the parties are at issue, or within a certain time thereafter (*McGivern v. Wilson*, 160 Mass. 370, 35 N. E. 864; *Cleverly v. O'Connell*, 156 Mass. 88, 30 N. E. 88), or within the time directed by the court (*Graham v. Lord*, 170 Mass. 1, 48 N. E. 778), and a failure to do so is a waiver of the right to a jury trial (*Doll v. Anderson, supra*; *Graham v. Lord, supra*; *Vitrified Wheel, etc., Co. v. Edwards*, 135 Mass. 591). Where the time for demanding a jury trial is regulated by statute, the right to a jury is lost if not demanded within the time prescribed. *In re Neasmith*, 147 Fed. 160.

It is variously provided that a jury must be demanded when the causes are assigned for trial (*Waterman v. Rand-*

*lett*, 84 N. W. 680); on or before the calling of the docket (*Lemon v. Ward*, 3 Ariz. 219, 73 P. 443; *Heard v. Kennedy*, 116 Ga. 36, 42 S. E. 509; *Haythorn v. Van Keuren*, 79 N. J. L. 101, 74 A. 502; *Phoenix Pottery Co. v. Arthur L. Perkins Co.*, 79 N. J. L. 78, 74 A. 258; or within a certain time after filing the declaration (*Condon v. Gore*, 89 Md. 230, 42 A. 900, in which the court held that the filing of an amended declaration will not extend the time); at or before the time of filing a plea (*Baltimore v. Thomas*, 115 Md. 212, 80 A. 726); or answer (*Baldwin v. McDonald*, 24 Wyo. 108, 156 P. 27); with last pleading (*Cluxton v. Dickson*, 12 Canada Law Journal, NS 310); at or before the time of joining issue (*Hall v. Chicago, etc., R. Co.*, 65 Iowa 258, 21 N. W. 596; *McGivern v. Wilson, supra*); or within prescribed time thereafter (*Odell v. Reynolds*, 40 Mich. 21); before the case is set for trial (*Salvo v. Wilson*, 189 Ala. 446, 66 S. 613; *Consolidated Gas, etc., Engine Co. v. Blanda, supra*); on the first day of the term (*Sutton v. Gunn*, 86 Ga. 652, 12 S. E. 979); within the first three days of the term (*McClellan v. State*, 118 Ala. 122, 23 S. 732); on appearance day (*Cruger v. McCracken* (Tex. Civ. A.), 26 S. W. 282).

A demand for a jury trial is properly refused where its purpose is to delay and obstruct a trial (*Clarke v. Baker*, 192 Mass. 226, 78 N. E. 455). In *Rives v. Columbia*, 80 Mo. A. 173, under statute, either party to a cause triable by jury shall be entitled to an order for special venire on motion made therefor three days before that on which the case is set for trial, where application was made in time, but where a party failed to have the motion considered until the case was called for trial, he waived his right.



**CONCLUSION.**

For the foregoing reasons plaintiff respectfully urges that the Municipal Court of Appeals was in error and its judgment should be reversed.

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Washington, D. C.,  
*Attorneys for Appellant.*







# **APPENDIX**





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IN THE  
**United States Court of Appeals**  
DISTRICT OF COLUMBIA

---

No. 9393.

---

GARFIELD I. KASS, *Appellant*,

v.

EMANUEL BASKIN, *Appellee*.

---

Appeal from the Municipal Court of Appeals for the  
District of Columbia.

---

**JOINT APPENDIX.**

---

Filed March 11, 1946

IN THE

Municipal Court for the District of Columbia  
Civil Division, Landlord and Tenant Branch  
500 Fourth Street, N. W., First Floor  
Washington, D. C.

GARFIELD I. KASS, 4461 Conn. Ave. N. W., Washington, D. C.,  
*Plaintiff*

vs.

EMANUEL BASKIN, 307 Seventh Street, N. W.,  
Washington, D. C., *Defendant*

No. L. & T. ....

**Complaint for Possession of Real Estate.**

DISTRICT OF COLUMBIA, ss.:

Garfield I. Kass being first duly sworn, states that plaintiff is entitled to the possession of premises No. 307 Seventh Street, N. W. located in the District of Columbia, which the defendant holds without right. The premises are in possession of the defendant, who holds them as a tenant under lease of the plaintiff.

The ground or grounds upon which possession is sought are: (Check one of the following)

- ☐ Defendant's default in the payment of rent, there being now due rent in the sum of \$..... for the period from ..... to .....
- ☐ That possession is sought under Section 5 of the District of Columbia Emergency Rent Act by reason of the following: (Explain fully).
- ☒ That possession is sought herein for a violation by defendant of a provision in said lease providing against subletting without the written consent of the landlord first had and obtained.

Affiant also states: (Check one of the following)

- ☐ That a notice to quit has been served upon the defendant as required by law;
- ☒ That service of a notice to quit has been specifically waived in writing.

Affiant therefore says that plaintiff is entitled to judgment for possession of said property (and for judgment in the sum of \$. . . . . for rent in arrears) and costs of this suit.

/s/ GARFIELD I. KASS  
*Plaintiff (or Agent)*

Subscribed and sworn to before me this 8th day of March, 1946.

Notarial Seal

.....  
*Notary Public, D. C.*

### **Summons**

To: Emanuel Baskin  
 307 Seventh St. N. W. DC  
*Defendant*

You are hereby summoned to appear in this Court on 25th day of March, 1946, at 9:30 a.m. to answer the Plaintiff's Suit, and show why he should not have judgment against you for the cause of action stated in this complaint for possession of the above-named premises (and for judgment in the sum of \$. . . . . for rent in arrears); and in case of your failure so to appear and answer judgment will be given against you by default. The hearing upon this claim will be held in the Landlord and Tenant Branch, located on the First Floor, 500 Fourth St. N. W.

If you have witnesses, books, receipts, or other writings bearing on this claim, you should bring them with you at the time for the hearing.

The Rent Administrator, 1740 Massachusetts Avenue, N. W., may intervene in any suit or action wherein a party



relies for ground of relief or defense upon the Rent Control Act.

If you admit the claim, but desire additional time to pay, you must come to the Court and state the circumstances.

You may come with or without a lawyer.

The costs of this case now amount to \$1.00 and you are not required to pay any more if you settle the claim before the hearing.

Witness, the Honorable George P. Barse, Chief Judge of said Court, this 11th day of March, A. D. 1946.

WALTER F. BRAMHALL

*Clerk*

By /s/ KATHERINE CORNWELL,  
*Deputy Clerk*

LOUIS OTTENBERG  
H. MAX AMMERMAN,  
Investment Bldg. D. C.  
*Attorneys*

Bring This Summons With You At All Times

2a **Praeipie for Appearance of Henry S. Snyder.**

This paper has evidently been mislaid or lost. The name of Henry S. Snyder appears on the Answer as one of the attorneys for the defendant.

3 Filed March 29, 1946

**Answer to Complainant for Possession of Real Estate.**

The answer of the defendant, Emanuel Baskin, states:

1. Defendant denies that plaintiff is entitled to the possession of the premises 307 Seventh St. N. W. and denies that he holds the said premises without right. Defendant says he is in possession of the said premises under a lease for a term which has not expired, and under which said lease this defendant is not now in default.

2. As a separate defense defendant denies that he has violated any provision of the lease, and specifically denies

that he has violated any provision of the lease about sub-letting without written consent of the landlord. As a separate defense, and without waiving the defenses herein set forth, defendant says that if said premises were re-let or sub-let, by this defendant, and if such re-letting or sub-letting constituted a violation of the covenant of the said lease, then said violation has been waived and condoned by the plaintiff.

3. Defendant demands trial by jury of the issues between the plaintiff and the defendant in the above case.

/s/ HENRY S. SNYDER

1115 - 15th St. N. W.

/s/ JACOB N. HALPER

1511 K St. N. W.

/s/ JACK POLITZ

1010 Vermont Ave. N. W.

*Attorneys for defendant*

4

Filed March 29, 1946

\$5.00 Pd

### **Motion for Trial by Jury.**

Now comes the defendant, Emanuel Baskin, and moves the Court to grant to the defendant trial by jury of the issues between the plaintiff and defendant in the above case, upon grounds set forth in the accompanying affidavit of Henry S. Snyder.

/s/ HENRY S. SNYDER

1115 - 15th St. N. W.

Washington, D. C.

/s/ JACOB N. HALPER

1511 K St. N. W.

Washington, D. C.

/s/ JACK POLITZ,

1010 Vermont Ave. N. W.

Washington, D. C.

*Attorneys for Defendant*

To: Louis Ottenberg and  
 H. Max Ammerman  
 Investment Building  
 Washington, D. C.  
 Attorneys for Plaintiff

The above motion will be for a hearing on April 1, 1946,  
 at 10:00 o'clock, a. m.

/s/ HENRY S. SNYDER

/s/ JACOB N. HALPER

/s/ JACK POLITZ

*Attorneys for Defendant*

A copy of the above motion, the accompanying affidavit  
 and defendant's answer to the complaint is hereby acknowl-  
 edged this ..... day of March, 1946.

.....  
*Attorney for Plaintiff*

5

Filed March 29, 1946

**Affidavit of Henry S. Snyder.**

DISTRICT OF COLUMBIA, to-wit:

Henry S. Snyder, being first duly sworn, deposes and  
 says that he is a member of the bar of this Court and makes  
 this affidavit on behalf of the defendant's motion for a trial  
 by jury. Affiant says that on Friday, the 22nd day of  
 March, 1946, he received a telephone call from Mr. J. Bas-  
 kin, the father of the defendant herein, stating that Eman-  
 uel Baskin, the defendant, was out of the city, and request-  
 ing that the above-entitled action, which was then return-  
 able on March 25, 1946 be continued. Affiant then had no  
 knowledge of the transactions involved in this case nor the  
 issues of fact or of law involved in fact affiant had no  
 information whatsoever about the case except that it was a  
 landlord and tenant proceeding. Affiant was requested by  
 Mr. J. Baskin to merely continue the case until his son



should return to the city, which was expected to occur on the 27th of March, 1946. Neither the defendant nor the said J. Baskin indicated to Mr. Snyder that he would be employed to represent the defendant, and the extent of affiant's action in this case was merely to continue the trial; thereupon, affiant notified H. Max Ammerman, of his desire to continue the case and thereupon related to Mr. H. Max Ammerman the facts hereinbefore set forth.

Thereafter, that is to say, on March 26, 1946, affiant was employed as one of the counsel in the case, and thereupon, having become acquainted with the nature of the issues involved and having advised the defendant thereof, the said defendant thereupon requested affiant to move for a trial by jury. Affiant advises that he knows of no facts or circumstances that would prejudice the plaintiff if this motion was granted.

/s/ HENRY S. SNYDER

Subscribed and sworn to before me this 28 day of March, 1946.

/s/ OLIVE C. WADLIN  
Notary Public, D. C.

### **Motion Denied for Trial by Jury.**

6

Friday, April 1, 1946  
Judge Margold

\* \* \* \* \*

Comes now the defendant and moves the Court for a trial by Jury, the same being hereby denied.

### **Trial Finding for Plaintiff.**

Thursday, April 18, 1946  
Judge Margold

\* \* \* \* \*

Come now the parties hereto and this cause being heard and submitted the court finds in favor of the plaintiff. Wherefore, it is considered that the plaintiff recover of the defendant possession of premises.

Filed April 22, 1946

**Motion for a New Trial or for a Judgment Non Obstante Veredicto.**

Now comes the defendant and moves for a new trial or for a judgment non obstante veredicto for the following reasons:

1. The Court erred in overruling the defendant's motion for a trial by jury.

2. The finding of the Court is contrary to the evidence, contrary to the weight of the evidence, and contrary to the proof.

3. The finding of the Court is contrary to law. The Court is without jurisdiction as the relationship of landlord and tenant had not ended nor had the estate of the defendant been terminated, nor had the plaintiff declared a forfeiture of the defendant's estate.

4. The defendant is entitled to judgment in his favor, notwithstanding the finding of the Court, upon the proofs and upon the matters of law submitted to the Court during the proceedings.

5. Upon such grounds as shall be advanced upon the hearing of this motion and as appears by the record of the proceedings.

/s/ JACOB N. HALPER  
1511 K St. N. W. Wash. D. C.

/s/ JACK POLITZ  
1010 Vermont Avenue, N. W.

/s/ HENRY S. SNYDER  
1115 - 15th St. N. W.  
*Attorneys for Defendants*

To H. MAX AMMERMAN  
Investment Building  
Washington, D. C.  
*Attorney for Plaintiff*

\* \* \* \* \*

**Order Overruling New Trial and Judgment.**

8

Wednesday, May 15, 1946

Judge Margold

\* \* \* \* \*

Defendant's motion for new trial, filed herein, on April 22, 1946 is hereby denied.

Wherefore it appearing under rule of court that judgment on the verdict should be entered, it is so ordered. Therefore it is considered that the plaintiff recover of the defendant the within described premises, plus costs, and have execution thereof.

9

Filed May 24, 1946

**Notice of Appeal.**

Notice if hereby given that Emanuel Baskin, defendant herein, appeals to The Municipal Court of Appeals for the District of Columbia from the judgment of this Court entered on the 15th day of May, 1946.

/s/ JACOB N. HALPER

1511 K Street, N. W.,

*Attorney for Defendant*

\* \* \* \* \*

10

Filed May 29 1946

In the Municipal Court for the District of Columbia  
Civil Branch                      Landlord & Tenant Division

L & T No. 116,101

GARFIELD I. KASS, *Plaintiff*

vs.

EMANUEL BASKIN, *Defendant*

**Statement of Errors Claimed.**

1. It was error for the Court to deny the defendant trial by jury, no prejudice being shown to the plaintiff if the jury demand was granted.



2. The Court erred in finding for the plaintiff for possession upon a complaint charging sub-letting, when as a matter of fact, there was an assignment by the tenant, an assignment not being prohibited by the terms of the lease.

3. The relationship established between the tenant and the so-called sub-tenant was that of licensor and licensee and, therefore, a transfer to the sub-tenant of possession of part of the premises was not a violation of the terms of the lease.

4. Granting that there was a sub-letting, the violation was waived by the landlord, and the Court should so have found.

5. Where a landlord attempts to declare a forfeiture of a lease because of a violation of a covenant against sub-letting, negotiations between the landlord and his tenant resulting in a lease of the same premises to the sub-tenant to commence upon the expiration of the tenant's term, is in itself a waiver of the covenant against sub-letting.

6. The declaration of a forfeiture by the landlord was optional with him, and the evidence does not support a finding that he ever exercised the option.

7. The evidence does not support the Court's finding on any of the issues in the case.

/s/ JACOB N. HALPER  
1511 K Street, N. W.  
*Attorney for Defendant*

\* \* \* \* \*

### **Excerpts from Proceedings.**

15 Mr. Halper: Now, Your Honor, the next matter I would like to bring to your attention is this:

Your Honor will recall that upon the last return day there was a motion by the defendant for trial by jury; that motion was overruled. At the time we, you and I, had some discussion about the reasons for granting the motion, and Your Honor said that you would sign an opinion, which I

have prepared, a copy of which I sent to Mr. Ammerman some time ago.

The Court: Well I generally like to write my own opinions.

I will say this for the record, it goes in substance with my reasons that this is the form, of the opinion, if I file one. I don't know. I might elaborate on it if I were going to write an opinion.

Mr. Halper: I have no objection to Your Honor writing his own opinion. I just tried to save the Court's time and to prepare what I thought was the Court's view.

The Court: Well I think that states the substance  
16 of it; but what I said at the time was, that I thought under all the circumstances presented I ought to exercise my discretion by denying the motion for leave to file jury.

Mr. Halper: Yes, sir. Your Honor also said that you thought that the case was one that might just as easily be tried by the Court.

The Court: I think that is so. There was nothing shown to me which made it especially advisable to have a jury trial.

Now that is in the record, because you have got a stenographer.

Mr. Halper: Yes. Your Honor, then, is going to sign that memorandum?

The Court: I don't see the necessity for it. You have it in the record.

Mr. Halper: I see.

The Court: An opinion ought to be something more elaborate than this. I think this is merely to get a record of what my conclusions were. You have got that now, in the stenographer's record.

Mr. Halper: Yes. Well I said, I used this language:

"I think this case may just as easily and as well be tried by the Court as by a jury".



The Court: Well I don't know if that was my exact language. The thought is the one I have already presented; that there are no special circumstances brought out  
 17 here which indicate that a jury trial would be preferable, or why there were special reasons for allowing a jury trial was at my discretion.

Mr. Halper: Yes. I have that in the order.

Then I would like to add, too, since it is going to be a matter of record, that Your Honor found no prejudice to the plaintiff—

The Court (Interposing): Well I didn't go into that at all. I don't think that is necessary.

Mr. Halper: Well I want to make the point here that I think the Court of Appeals has said that the Court might grant the right in his discretion, especially if it appears that there is no prejudice to the other party by granting it.

The Court: I don't deny that I have authority to do it in my discretion, so that I think that is all that case decides, that I do have the authority to grant it if in my discretion I feel it advisable.

My ruling is that there is nothing here which appeals to my discretion in favor of exercising it, or in favor of allowing a jury trial.

Mr. Halper: Yes. Then I renew, of course, my objection to the Court's order.

The Court: Well you have your exception.

\* \* \* \* \*

183 (Following argument of counsel for both sides:)

The Court: I would say this: that if a jury had decided it otherwise, it would only be an indication that a jury can be misled more easily than a judge.

I will make a general finding in favor of the plaintiff, on all issues of fact, and decide all questions of law in their favor, so far as they are pertinent.

\* \* \* \* \*



## Opinion

205      The Municipal Court of Appeals for the  
             District of Columbia

No. 401

EMANUEL BASKIN, *Appellant*,

v.

GARFIELD I. KASS, *Appellee*.

Appeal from The Municipal Court for the  
             District of Columbia,  
             Civil Division.

(Argued August 1, 1946                      Decided August 30, 1946)

Jacob N. Halper for appellant.

H. Max Ammerman, with whom Louis Ottenberg was on  
the brief, for appellee.

Before Cayton, Chief Judge, and Hood and Clagett,  
Associate Judges.

Cayton, Chief Judge: The critical question on this ap-  
peal is whether the trial judge abused his discretion in de-  
nying a jury trial to defendant. This was a landlord and  
tenant case involving commercial property, which plaintiff  
charged had been sublet in violation of the terms of a lease  
between the parties.

There is a special rule of the Landlord and Tenant  
Branch of the trial court (Rule 7) governing the manner of  
securing jury trials. It provides:

“Any party entitled to a jury trial and desiring same  
shall file a demand for such jury trial, signed by the party  
or his attorney of record, accompanied by the fee herein  
provided, or, in the absence of such payment, upon a waiver  
thereof by the judge. Such demand shall be filed not later  
than the time for appearance of the defendant stated in the  
notice, or such extended time as the judge may fix by  
206      special order in the case, and, if made by the defen-

dant, must be accompanied by an answer of the defendant, or his agent setting out the facts upon which his defense is based."

Rule 7(b) provides that preferential status be given to this class of case.

The case was filed March 11, 1946, returnable on March 25, 1946. On the return day Henry S. Snyder, an attorney, appeared in court, and sought and obtained a continuance of the case until April 1. He did not then demand a jury trial, nor seek an extension of time for filing such demand. Four days later, on March 29, with two other attorneys, he filed an answer to the complaint, incorporating into the answer a demand for jury trial. At the same time they filed a motion for jury trial, which was supported by affidavit of Mr. Snyder. The substance of the affidavit was that three days before the return day Mr. Snyder was called on the telephone by the father of defendant who was out of the city and requested to obtain a continuance of the case; that Snyder had no knowledge of the transactions involved nor of the issues of fact or law involved and knew nothing of the case at all; that Snyder had not then been employed to represent defendant but was only asked to secure a continuance; that he notified plaintiff's counsel of these facts; that it was not until the day after the return day that Snyder was employed as one of the counsel in the case and immediately after becoming acquainted with the issues involved and having advised defendant thereof, defendant requested him to move for a jury trial. He concluded the affidavit by saying that he knew of no facts or circumstances that would prejudice the plaintiff if the motion were granted.

No opposing affidavit was filed by plaintiff and so far as the record reveals, no testimony was taken on the motion for jury trial when it was presented to the trial judge on April 1. The motion was denied. Summarizing for the record his reasons for denying a jury trial, the trial judge later said, "I thought under all the circumstances presented



I ought to exercise my discretion by denying the motion \* \* \*"; that the case was one that might just as easily be tried by the court; that "there was nothing shown to me which made it especially advisable to have a jury trial"; "that there are no special circumstances brought out here which indicate that a jury trial would be preferable, or why there were special reasons for allowing a jury trial was at my discretion." He also said, responding to a statement by counsel that he (the judge) had found no prejudice to plaintiff, "Well I didn't go into that at all. I don't think that is necessary." The judge conceded that he had discretionary power to grant the motion but concluded by saying: "My ruling is that there is nothing here which appeals to my discretion in favor of exercising it, or in favor of allowing a jury trial."

The case later proceeded to trial before the same judge, who found for plaintiff for possession of the property in dispute. This appeal followed.

We must hold that the trial judge abused his discretion by refusing defendant a trial by jury. It is true of course, that defendant did not file his jury demand on the return day, nor seek an extension of time for filing the demand. If that were all that the record showed, it would be correct to say that defendant had waived his right to a jury trial.<sup>1</sup> But the record shows considerably more. It shows that just four days later and three days before the continued date of the case (and two weeks before the case was actually tried) defendant sought to comply with the rule by filing his answer and making his demand for jury trial. Moreover defendant presented the affidavit of Mr. Snyder which made a rather full and reasonable explanation of the circumstances which prevented him from filing the demand on time. We think the affidavit, uncontradicted as it was, reasonably explained the inadvertence, made out a case of excusable neglect, and effectively negatived any thought of an intentional waiver of the right to trial by jury. It seems

<sup>1</sup> *Kennedy v. David*, 71 App. D. C. 340, 109 F. 2d 676, and cases there cited.



to us that upon that showing defendant was reasonably entitled to have his jury demand honored, unless the trial judge found that allowing a jury trial would prejudice some substantial rights of plaintiff. And it is doubtful that he could have found such prejudice to plaintiff in view of Mr. Snyder's sworn statement to the contrary, of which statement there is no denial in the record by way of affidavit, or even by statement of opposing counsel.

But the trial judge "didn't go into that at all" and did not think it was necessary. Therein we think he was  
 208 in error, for he was attempting to exercise judicial discretion without applying judicial standards. He decided that defendant should not have a jury trial, without inquiring or considering whether a jury trial would prejudice the plaintiff. He did not weigh the rights of the parties one against the other, or attempt to strike a judicial balance as to the consequences of granting or refusing a jury trial. He seems to have been guided by his individual or personal views as to what was "advisable" or "preferable" in the situation. This is not the proper or recognized approach in deciding a matter which should "be determined in the exercise of judicial, not personal, discretion."<sup>2</sup> "Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect \* \* \* to the will of the law."<sup>3</sup>

Dealing specifically with the question before us the United States Court of Appeals for this District has held it an abuse of discretion to deny a jury trial when the demand, though late, was made before the issues were made up and before the case was ready for trial. *Barrett v. Sterrett*, 66 App. D. C. 321, 87 F. 2d 224. The Court stressed that delay in complying with a rule of court as to jury demand "does not deprive a party of the right of trial by

<sup>2</sup> *Laughlin v. Berens*, 73 App. D. C. 136, 118 F. 2d 193.

<sup>3</sup> *Osborn v. United States Bank*, 22 U. S. 738; see also *Langnes v. Green*, 282 U. S. 531; *Cornwell v. Cornwell*, 73 App. D. C. 233, 118 F. 2d 396; *Potomac Small Loan Co. v. Myles*, D. C. Mun. App. 34 A. 2d 609, 71 W. L. R. 1275.

jury *unless to grant the right would operate to the prejudice of his adversary.*"<sup>4</sup> (Emphasis supplied)

The question has twice been before this court. In *Daly v. Scala*, D. C. Mun. App. 39 A. 2d 478, 72 W.L.R. 1140, we held it was not error to allow a jury demand to stand, under the circumstances of the case, though it was filed two weeks late. We said:

"The right to jury trial is so jealously regarded by our courts that parties may not be deprived of it by a rigid construction of a procedural rule. Rules or statutes limiting the time for filing a demand for jury trial, although mandatory in terms, are not always so regarded. It is the rule in this and in other jurisdictions *that where the opposing party is not prejudiced*, the court, in its discretion, may waive the delay, and its refusal to enforce the time limitation is not reversible error." (Emphasis supplied)

And in a later case, *Barnes v. Conner*, D. C. Mun. App., 44 A. 2d 925, 73 W. L. R. 1091, defendant claimed to have misapprehended the judge's instructions as to when his answer and jury demand were to have been filed, and filed them a few hours after default judgment was entered. We set aside the default, saying:

"Naturally, we do not condone either wilful or negligent disregard of court rules or orders, but before a litigant is deprived of his day in court and his right to trial by jury, there must be shown a greater neglect, or a more plain disregard of rules, or some clearer *prejudice to the opposing party*, than appears here." (Emphasis supplied)

Thus we see that in a situation of this kind the question of possible prejudice to the opposing party could very well be the determining factor in shaping the judge's discretion as to whether the right to jury trial should be denied. But in

<sup>4</sup> Compare *Kennedy v. David*, 71 App. D. C. 340, 109 F. 2d 676, where the court upheld the denial of a jury trial because the demand was filed more than a month late, after the case had been set for trial on the non-jury docket, and after the plaintiff had presumably prepared his case on that basis.



this case there was neither showing or finding of prejudice to plaintiff (and indeed no inquiry at all into that phase of the case). Nor was the delay a long one, or the neglect inexcusable. Under the circumstances we must reverse the judgment below and remand the case with instructions to vacate the judgment, and grant defendant's motion for trial by jury.

*Reversed.*

\* \* \* \* \*

210

**Judgment.**

Appeal from the Municipal Court for the District of Columbia, Civil Division. This cause came on to be heard on the transcript of the record from the Municipal Court for the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court, in this cause, be and the same is hereby, reversed with costs, and that this cause be, and it is hereby, remanded to the said Municipal Court with instructions to vacate the judgment, and grant defendant's motion for trial by jury.

NATHAN CAYTON,  
*Chief Judge,*  
 August 30, 1946.

\* \* \* \* \*

**Docket Entry in L. & T. 116-101.**

March 25, 1946—Continued to April 1, 1946, by the  
 Defendant.







**No. 9393**

**BRIEF FOR APPELLEE**

---

**United States Court of Appeals**

DISTRICT OF COLUMBIA

---

GARFIELD I. KASS, *Appellant*,

VS.

---

EMANUEL BASKIN, *Appellee*.

---

Appeal from the Municipal Court of Appeals for the  
District of Columbia

---

*United States Court of Appeals  
for the District of Columbia*

**FILED** APR 10 1947

*Joseph W. Stewart*

CLERK

JACOB N. HALPER  
1511 K Street, N. W.  
Washington, D. C.  
*Attorney for Appellee*





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| <i>McNabb v. Kansas City Life Ins. Co.</i> , 139 F (2d)<br>591 -----                                         | 5, 13, 17 |
| <i>May v. Melvin</i> , 78 U. S. App. D. C. 368, 141 F (2d)<br>22 -----                                       | 5, 13, 16 |
| <i>New York Investors, Inc., v. Laurelton Homes,<br/>Inc.</i> , 230 App. Div. 712, 243 N. Y. Supp. 246 ----- | 7         |
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| <i>Vickers v. Philip Carey Co.</i> , 151 P. 1023, 1028,<br>49 Okl. 231 -----                                 | 5         |
| <i>Wilson v. Michigan State Board of Registration</i> ,<br>228 Mich. 27, 199 N. W. 644 -----                 | 5         |



# United States Court of Appeals

DISTRICT OF COLUMBIA

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No. 9393

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GARFIELD I. KASS, *Appellant*,

VS.

EMANUEL BASKIN, *Appellee*.

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Appeal from Judgment of the Municipal Court of Appeals  
for the District of Columbia

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BRIEF FOR APPELLEE

## COUNTER-STATEMENT OF THE CASE

March 11, 1946, the appellant, landlord, commenced the summary proceedings in the landlord and tenant branch of the Municipal Court to evict the appellant tenant, in possession of commercial property, charging a forfeiture of the tenancy because of breach of covenant against sub-letting without the landlord's consent (App. 2-4). The Appellant's term ends August 31, 1947 (R. 186). The time for the appearance of the defendant was March 25, 1946 (App. 3), at which time Henry S. Snyder, an attorney, appeared for the defendant (App. 4) and without objection of the plaintiff, secured a postponement to April 1, 1946 (App. 18). He did not then demand trial by jury nor request the court to enlarge the time for making demand. On March 29, 1946, Snyder, together with two other attorneys, filed an answer on behalf of the defendant in which they denied the plaintiff's right to possession of the premises in question; denied that defendant had violated the covenant against sub-letting, and further set up the alternate defense of waiver of the covenant (App. 4). They also moved for trial by jury, (App. 5) submitting in support thereof, the affidavit of Snyder (App. 6, 7).

In substance Snyder stated that on March 22, 1946, he was called by the father of the defendant, the defendant then being out of the city, and requested to secure a continuance; that Snyder had no knowledge of the transactions involved nor of the issues of law or fact; that he did not know that he would be employed to represent the defendant and that his only action in the case was to secure the continuance; on March 26, 1946, he was employed as one of counsel and having become acquainted with the nature of the issues involved, so advised the defendant who requested that he move for trial by jury; that he knew of no facts or circumstances that would prejudice the plaintiff if the motion was granted. The motion came on for hearing on April 1, 1946, at which



time no opposing affidavits were filed by the plaintiff nor testimony taken on the motion. The motion was denied (App. 7). Thereafter, upon being asked to sign a prepared opinion setting out the reasons for the court's action, the following colloquy occurred between court and counsel:

BY THE COURT: "I thought under all the circumstances presented I ought to exercise my discretion by denying the motion for leave to file jury." (App. 11)

BY COUNSEL: "Your Honor also said that you thought that the case was one that might just as easily be tried by the Court." (App. 11)

BY THE COURT: "I think that is so. There was nothing shown to me which made it especially advisable to have a jury trial \* \* \* there are no special circumstances brought out here which indicate that a jury trial would be preferable, or why there were special reasons for allowing a jury trial was at my discretion." (App. 11, 12)

BY COUNSEL: "Your Honor found no prejudice to the plaintiff." (App. 12)

BY THE COURT: "Well, I didn't go into that at all. I don't think that is necessary \* \* \*. My ruling is that there is nothing here which appeals to my discretion in favor of exercising it, or in favor of allowing a jury trial." (App. 12)

The case proceeded to trial without a jury before the same judge who passed on the motion for jury trial. There was a trial on the merits on April 18, 1946 (App. 7) and a finding for plaintiff.

At the conclusion of the trial, the judge stated:

"I would say this: that if a jury had decided it otherwise, it would only be an indication that a jury can be misled more easily than a judge." (App. 12). Judgment having been entered on the verdict, the defendant appealed to the Municipal Court of Appeals for the District of



Columbia (App. 9) which reversed the judgment of the trial court and remanded with instructions to vacate the judgment and grant defendant's motion for trial by jury App. 18). This court allowed an appeal from the judgment of the Municipal Court of Appeals for the District of Columbia.

### **STATEMENT OF POINTS**

It was an abuse of discretion to deny the defendant trial by jury in the circumstances of this case.

### **SUMMARY OF ARGUMENT**

1. Courts have inherent power, in their discretion, to grant trial by jury in cases of belated demands.

2. No presumption of waiver arises by reason of failure to comply with a rule of court respecting jury demands; waiver must be intentional and the presumption is against waiver.

3. Discretion, when exercised, follows legal principles; not the personal view of the judge.

4. If the right has not been intentionally waived, the same principles govern trial by jury as when the right has been timely asserted; courts do not grant relief as a matter of grace.

5. A case may not be reversed upon an inconsistent theory not advanced in the trial court.

### **ARGUMENT**

**The Court Is Vested with Discretion to Grant Trial by Jury  
in Cases of Failure to Make Timely Demand  
as Prescribed by Court Rule**

Rule 7 (a) of the Municipal Court Landlord and Tenant Branch, which requires demand for trial by jury to be made not later than the time for the appearance of the

defendant stated in the notice, does not, in express terms, grant the court discretion to allow such trial in cases of belated demands, such as is prescribed by Rule 39 (b) of the Federal Rules of Civil Procedure. *May v. Melvin*, 78 U. S. App. D. C., 368, 141 F. (2d) 22; *McNabb v. Kansas City Life Ins. Co.*, 139 F. (2d) 591. However, by the adjudicated cases, the Municipal Court for the District of Columbia, has such discretion. *Barrett v. Sterrett Operating Service*, 66 App. D. C. 321, 87 F. (2d) 224; *Kennedy v. David*, 71 App. D. C., 340, 109 F (2d) 676; *Daly v. Scala*, D. C. Mun. App. 39 A. (2d) 478, 72 W. L. R. 1140; *Barnes v. Conner*, D. C. Mun. App. 44 A. (2d) 925, 73 W. L. R. 1091.

But an examination of the cases discloses that the same general principles apply whether the discretion is expressly granted by statute or rule or is found in the inherent power of the court. In the case of *Vickers v. Philip Carey Co.* 151 P. 1023, 1028, 49 Okl. 231, it is stated that:

“The ‘discretion’ spoken of in the authorities is a legal discretion, a discretion to be exercised in discerning the course prescribed by the law, according to principles ascertained by adjudged cases.”

In *Wilson v. Michigan State Board of Registration*, 228 Mich. 27, 199 N. W. 644, plaintiff, claiming reciprocal rights as a former practitioner of a sister state, was denied a license to practice medicine. Relying on the words “at the discretion of the Board”, the licensing board denied the license. The Court, finding that the board “sets up no fact or set of facts upon which it exercised such discretion, if it did so, and in its answer gives no grounds or reason for such refusal”, says: (p. 644)

“To such boards is, and must be, committed the exercise of a sound discretion, but to them is not committed the exercise of an arbitrary will. They may exercise their discretion, but it must be exercised upon the facts before them.”



The Municipal Court of Appeals thought that in the situation of the present case, the question of possible prejudice to the opposing party could well have been the determining factor in shaping the judge's discretion. But not only was there absence of showing or finding of prejudice, but the judge did not think it necessary to inquire into possible prejudice (App. 12). Thus, the judge's discretion could not have been exercised upon the facts before him. In *Barrett v. Sterrett Operating Service, supra*, this Court held that delay in complying with a rule of court as to jury demand "does not deprive a party of the right of trial by jury unless to grant the right would operate to the prejudice of his adversary." And in *Daly v. Scala, supra*, in which a jury demand filed two weeks late was allowed to stand the Municipal Court of Appeals said:

"The right to jury trial is so jealously regarded by our courts that parties may not be deprived of it by a rigid construction of a procedural rule. Rules or statutes limiting the time for filing a demand for jury trial, although mandatory in terms, are not always so regarded. It is the rule in this and in other jurisdictions that where the opposing party is not prejudiced, the court in its discretion, may waive the delay, and its refusal to enforce the time limitation is not reversible error."

And the same court in *Barnes v. Connor, supra*, where a party through misapprehension of the judge's instructions as to the time of demand, filed it a few hours after default, in vacating the default, said:

"Naturally, we do not condone either wilful or negligent disregard of court rules or orders, but before a litigant is deprived of his day in court and his right to trial by jury, there must be shown a greater neglect, or a more plain disregard of rules, or some clearer prejudice to the opposing party, than appears here."



**There Is no Presumption That Trial by Jury Is Waived  
by Failure to Comply with the Rule; Waiver Must  
Be Intention and with Full Knowledge of  
the Facts**

The right of trial by jury is fundamental, therefore, courts indulge every reasonable presumption against waiver. *Aetna Insurance Co. v. Kennedy*, 301 U. S. 389, 57 S. Ct. 809, 81 L. Ed. 169. As is said in *Hodges v. Easton*, 106 U. S. 408, 1 S. Ct. 307, 27 L. Ed. 169:

“It has often been said by this court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver.”

The Municipal Court of Appeals was of the opinion that the Snyder affidavit, uncontradicted, reasonably explained the failure to make due demand, made out a case of excusable neglect, and effectively negatived any thought of an *intentional* waiver (App. 15). Appellant apparently contends that failure to make demand within the time prescribed is of itself a waiver of the right. Thus he gives to Rule 7 (a) the rigid construction of a statute of limitations. He deems the question of inadvertence, mistake or unintentional waiver to have no place in the rule. However, this is not consonant with principles of justice and does violence to the constitutional guarantee of trial by jury. But it will be shown that even in cases where the statute or rule makes no provision for relieving a party from his failure to comply with the rule, courts have nevertheless inquired into the question of intentional waiver, inadvertence and mistake. Conversely where statute prescribes how the right to trial by jury is waived, the same principles are applied. In the case of *New York Investors, Inc., v. Laurelton Homes, Inc.*, 230 App. Div. 712, 243 N. Y. Supp. 246, the court said:

“The Court, however, is not without power, in the exercise of a sound discretion, to relieve a party who has failed to serve the demand prescribed by that

subdivision within the requisite period, where that failure is due to excusable mistake or inadvertence. The facts herein present an honest and excusable instance of mistake and inadvertent failure to serve the requisite notice, and disclose that the act of omission occurred under circumstances negating the idea that there was a wilful or intentional waiver of the substantial constitutional right to a jury trial possessed by the defendants.”

The Court further found that relieving from this mistake did not prejudice the adverse party. The subdivision referred to in the above quotation is Subd. 5, Sec. 426 of the Civil Practice Act of New York. It specifies in some detail how a party waives his right to trial by jury, and enumerates how a failure to take successive steps in the proceedings deprives the party of the right. No provision is made for relieving from default. By a later amendment to the act it is provided that “the court in its discretion may relieve a party from a failure to comply with the provisions of this subdivision if no undue delay or prejudice to the right of (the other) party would result.” *Preble v. Graeme*, 58 N. Y. Supp. (2d) 398. Thus there is embodied in the statute the principle that courts generally observe.

**Judicial Power Is Never Exercised for the Purpose of Giving Effect to the Will of the Judge; Always for the Purpose of Giving Effect to the Will of the Law**

The trial judge conceded he was vested with a discretion in this case but did not think it necessary to inquire whether possible prejudice to the opposing party would result if the plaintiff's demand was granted. He thought the case was one which might just as easily be tried by the court and that there was nothing shown which made it especially advisable to have a jury trial or why a jury trial was preferable.

The Municipal Court of Appeals was of the opinion that in this the trial judge erred; that he was attempting to ex-



ercise judicial discretion without applying judicial standards; that he come to his decision without inquiring or considering possible prejudice to the defendant, and that he seems to have been guided by his personal views in a matter which should be determined in the exercise of judicial and not personal discretion. An examination of the authorities discloses that the Municipal Court of Appeals has set the proper standard for the courts to follow in cases of this kind.

The principle was laid down in the early case of *Osborn v. U. S. Bank*, 22 U. S. (9 Wheat.) 738, 866, 6 L. Ed. 204:

“Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.”

The case of *State v. District Court of Jefferson County*, 238 N. W. 290, was a criminal proceeding in which the State sought a change of venue. The trial court denied the application, and on appeal it was contended that the court's action was discretionary and not subject to review. The statute granting the right to petition for change of venue prescribed: “The court in the exercise of a *sound* discretion *must when fully advised* decide the matter of the petition *according to the very right of it.*” This was construed to mean “a sound discretion.”

Numerous affidavits were submitted by the State indicating it could not have a fair trial. The trial court denied the application because the state's showing was “*insufficient to satisfy me* that there was any excitement or prejudice against the state \* \* \* that would in any manner prevent the state from securing a fair and impartial trial \* \* \*.”



The appeals court observed that the defendant, if unsuccessful, may have a new trial, but the state is precluded on the principle of double jeopardy. "The state is peculiarly entitled to have its application determined in accordance with common experience and probabilities and in the *exercise of sound discretion*, not merely on *individual or personal views*." (Italics added)

It is further held that "if the *reasons given by the Court for its action* are clearly untenable or unreasonable, if its action clearly amounts to a denial of justice, if clearly against justice or conscience, reason, and evidence, it has abused its discretion \* \* \*." "Discretion does not mean the arbitrary will or merely *individual or personal view of the judge*." (Italics added).

*In re Bond's Guardianship*, 297 NY Supp. 493, 251 App. Div. 651, there was an application by a guardian for ancillary letters and the removal of the ward's property to a sister state. The ward and her mother, the applicant, had removed to another state, where the applicant had been appointed general guardian and had given sufficient bond. The ward's interests had been prejudiced because of controversies with the local guardian. The probate court was of the opinion that the granting of relief was discretionary and denied the application. The Court said: (p. 496)

"Almost every form of relief has been time out of mind labeled 'discretionary'. In judicial opinions, the word is one of repeated occurrence. The idea which it is designed to express is real, if perhaps vague. Discretion is not the judge's sense of moral right; neither is it his sense of what is just. He is not clothed with a dispensing power or privileged to exercise his individual notions of abstract justice. With him there is no scope for judicial caprice. Principles of law are to be ascertained and followed. Justice is administered in the courts on settled and fixed principles. It does not vary, 'like the Chancellor's foot'. The rights of litigants do not rest in

the discretion or *grace* of the judge. In all cases that come under his consideration a judge must act with discretion and discrimination and give weight to every circumstance bearing on the question to be adjudicated. He is not at liberty in determining personal or property rights to act at his own discretion unrestrained by the legal and equitable rules governing those rights." (*Italics added*)

**One May not Try a Case upon One Theory and then Reverse  
the Judgment against Him on Appeal upon Another  
Inconsistent Theory which is not Presented in  
the Court Below**

Following the decision of the Municipal Court of Appeals, appellant filed a motion in that Court for modification to permit the trial judge "to recite the reasons which prompted his action in denying the motion for a jury trial". This motion was denied (R. 211-216).

Nevertheless, the trial judge wrote an opinion in the case of *Bell v. Westbrook*, L & T No. 108281, reported in Vol. 74 of the Washington Law Reporter at page 1171, in which the reasons for his action in the present case are set forth. Although counsel for Appellant states (page 3 of appellant's brief) that the judge refused to sign an opinion prepared by appellee's counsel because it did not adequately express his views, the record shows that it stated the judge's reasons in substance (App. 11).

In his opinion the trial judge now advances these reasons for denying trial by jury, (74 W. L. R. 1172):

"\* \* \* the defendant conceded that his right to a trial by jury had been lost by his failure to comply with L & T Rule 7 \* \* \* 'the defendant asked to be allowed a jury as a matter of grace, asserting that the failure to demand a jury on the return day was an excusable inadvertence and that no prejudice would result to the plaintiff which he would not equally have incurred had a jury trial been secured as a matter of right. \* \* \*' I deemed it unnecessary to



inquire into and decide whether these assertions were true and held the defendant not entitled to a jury trial as a matter of grace, but only after I had made a full inquiry into the issues and the prospective evidence and had determined in consequence that the genuine defenses turned entirely on questions of law, that those involving questions of fact were insubstantial, that a jury trial was being sought primarily for purposes of delay, and that nothing had been shown which made it especially advisable to have a jury trial."

And further the trial judge states (74 W. L. R. 1173):

"\* \* \* I considered it unnecessary on the original motion to inquire into the question of prejudice. I inquired fully and carefully into the nature of the defenses interposed in the answer and of the evidence which the defendant proposed to introduce at the trial. I ascertained that the only defenses genuinely relied on by the defendant involved no issues of fact at all."

And in footnote 6 (74 W. L. R. 1173) the judge further states:

"\* \* \* counsel for the defendant was able to suggest some possibility that conflicting proof might develop at the trial. I remember concluding that the points involved were relatively minor, that the plaintiff's proof probably would be too weak to justify submission to a jury, and that request for a jury was inspired by a desire to delay the trial as much as possible and a hope that a jury's sympathies might be more readily enlisted in the plaintiff's favor than a judge's. I also remember thinking at the trial that while more conflict of evidence had developed than had been indicated on the argument of the motion, it still was hardly enough to have justified granting a jury trial as a matter of grace."

These considerations for denying trial by jury, now stressed by the trial judge, were not advanced in the trial court.



It was held by this Court in *Baldi v. Ambrogi*, 67 App. D. C. 101, 89 F. 2d, 845, that "Nothing is better settled than the rule that one may not try a case upon one theory and then reverse the judgment against him in the appellate court upon another and inconsistent theory which is not presented, urged, or tried in the court below."

Nevertheless, notwithstanding the later reasons advanced by the trial judge for denying the defendant's motion for trial by jury, the judge's attempt to justify his action in his brief in *Bell v. Westbrook*, *supra*, is without legal basis. The judge comes to the conclusion that there is a sharp distinction between jury demands as a matter of right and those addressed to the discretion of the Court; that in the latter cases failure to comply with the rules results in a waiver of the right, "whether there be *prejudice* to the opposing party or not." Then, although the judge did not deem it necessary to consider the matter of possible prejudice (App. 12), he concludes: "These questions (prejudice) may properly be considered by the court if a jury trial is asked as a matter of grace \* \* \*;"

The brief then goes on to discuss the *May v. Melvin*, *supra* and *McNabb v. Kansas City Life Ins. Co.*, *supra*, cases, and concludes:

"The May and McNabb cases mark out the distinctions and lay down the guide posts which I have consciously sought to follow in dealing with requests for jury trials as a matter of grace, where the opportunity to obtain them as a matter of right has been lost by noncompliance with the rules of court."  
(74 W. L. R. 1176)

What if the trial judge had inquired into and concluded that in the present case the demand was not interposed for purposes of delay; that the case presented well defined and substantial issues;<sup>1</sup> that the defendant did not enter-

1. The transcript of testimony, included in the record on appeal, demonstrates that the judge did not adequately anticipate the conflicting evidence.

tain the hope of enlisting the sympathies of the jury more readily than the judge's or that from the defendant's standpoint a trial by jury was preferable? Would the judge then have granted the defendant's demand? If so, it would have been predicated upon principles not found in the authorities and certainly not supported by anything said in the *May* and *McNabb* cases which the judge has consciously sought to follow. But if these are to be the factors in denying or granting the right, then they introduce into the administration of law principles not found there and violative of substantial constitutional rights. It is difficult to conceive of any established principle that grants to the court the prerogative to determine a litigant's preference for either mode of trial or to inquire into his hopes for achieving the desired result. It is even more difficult to determine how, in this case, the judge arrived at the conclusion that the demand for jury trial was interposed for purposes of delay; how he arrived at the defendant's hopes for a jury's sympathy; and even more difficult to determine how the judge established the preference of jury trial over trial by the court.

It is noted that in the judge's brief, repeated reference is made to granting a jury trial "as a matter of grace". This is a novel legal approach to the problem. It is extremely doubtful that courts of law in any case grant relief as a matter of grace. Thus it is well said that the "rights of litigants do not rest in the discretion or grace of the judge". *In re Bond's Guardianship, supra*. It may be, and indeed the judge's brief indicates, that he was dispensing justice according to personal grace. If that is so, this court should point out that the judge's discretion must follow ascertained principles of law, and not made to depend upon his personal preference.



**If the Court Finds there Has Been no Intentional Waiver  
of Trial by Jury, the Same Principles Should  
Govern in Granting the Right as in Cases  
of Absolute Right**

Are different principles of law applicable where trial by jury is granted in the discretion of the Court? It is supposed the discretion is exercised to relieve the applicant from his inadvertence or mistake, if there appears no prejudice to the opponent. But, is a litigant's right to trial by jury, in the absence of prejudice, to be tested by the strength or weakness of the proof; by the court's conclusion that there is a desire to delay the trial or a hope that a jury's sympathies might be more readily enlisted in plaintiff's favor than a judge's<sup>2</sup>

The case of *Slocum v. N. Y. Life Insurance Co.*, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, is in point.

This was an action to recover on a policy of insurance. The question was whether the policy was in force at the time of the insured's death. Defendant moved for a directed verdict which was denied and there was a general verdict for the plaintiff. The Circuit Court of Appeals reversed because the evidence was insufficient to support the recovery and directed judgment for defendant. The Supreme Court held the action of the Circuit Court of Appeals to be an infraction of the 7th Amendment and that the trial court should have been directed to grant a new trial. While the application of the rule was limited in a later case (*Baltimore & C Line v. Redman*, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. (636)) the principles announced in the *Slocum* case are applicable:

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2. There is no evidence that there was any attempt to delay the trial. Actually, trial was had within two weeks, and might have been had sooner but for postponements agreed upon in the interval. It is worthy of note that at the inception plaintiff agreed to a continuance for one week (App. 18). It may be that had plaintiff strenuously objected, defendant might have sought refuge in demanding a jury trial which would of itself have delayed the trial. It should also be noted that while the plaintiff's alleged cause of action accrued January 15, 1946 (R 196) suit was not filed until March 8, 1946 (App. 3) a delay not chargeable to the defendant.



(p. 398) "Whether in a given case there is a right to a trial by jury is to be determined by an inspection of the pleadings and not by an examination of the evidence. If the pleadings present material issues of fact, either party is entitled to have them tried to the court and a jury, and this is true of a second trial as of the first. Whether the evidence is sufficient to sustain a verdict for one party or the other is quite another matter and does not affect the mode of trial, but only the duty of the court in instructing the jury and of the latter in giving their verdict. The issues to which the jury must respond are those presented by the pleadings, and this whether the evidence be disputed or undisputed and whether it be ample or meagre. To speak, therefore, of the evidence as determinative of the right to a trial by jury is to confuse the test of that right with a different test applicable only in determining whether a particular verdict should be directed."

### CONCLUSION

Appellant seems to think that by the opinion of the Municipal Court of Appeals Rule 7 (a) has been interpreted to mean that only the failure to sustain the burden of showing prejudice will preclude a party from having a trial by jury at any time before trial. But the authorities, including those relied upon by the appellant, which are now considered, are to the contrary.

*Fidelity & Deposit Co., of Md., v. U. S.*, 187 U. S. 315, 47 L. Ed., 194, merely holds that a rule of court permitting summary judgment in the absence of an adequate affidavit of defense does not violate the 7th Amendment. This case has no application.

In *May v. Melvin, supra*, the delay in making demand extended from July 25, 1941 to November, 1942, and moreover, there was no showing of prejudice or other mitigating circumstances other than former counsel's inadvertence in not making timely demand. This case holds

the Court might have, in its discretion, ordered a jury trial.

In *Kennedy v. David*, *supra*, the delay was more than one month and there was no explanation of the failure to make timely demand.

In *Barrett v. Sterrett Operating Service*, *supra*, it was held to be an abuse of discretion to deny trial by jury where the demand was made a few minutes after the applicant had secured a continuance, and the grant would not have interfered with the orderly disposition of the court's docket, or worked a prejudice to the applicant's opponent.

*McNabb v. Kansas City Life Ins. Co.*, *supra*, involved a suit by an insurance agent for damages for wrongful termination of an agency contract. Plaintiff complained that he had been denied trial by jury, but the court found that failure to comply with Rule 38 (b), Federal Rules of Civil Procedure, is a legal waiver whether the failure is inadvertent or intentional. No facts appear to account for the failure, although the court observes that the trial court "could have exercised its discretion to allow a jury trial, notwithstanding the failure to serve a proper demand, but, in the situation shown, it was not required to do so." It is to be presumed that the situation shown was the failure to make demand without more.

Appellant states that the decision of the Municipal Court of Appeals is contrary to the principle of law announced by the Supreme Court of the United States in the case of *Bank of Columbia v. Okely*, 4 Wheaton 235, 4 L. Ed. 559, (Appellant's Brief p. 5) and complains that while he called the attention of the Municipal Court of Appeals to this case, it was not cited, distinguished, discussed or compared (Appellant's Brief p. 10). The *Okely* case has no bearing on the points involved in this appeal.

In the *Okely* case the defendant was not only deprived of a jury trial but he had no trial at all. The act of



Congress creating the bank permitted it to recover on notes indorsed to it if the notes were expressly negotiable at the bank. Instead of mesne process, trial and judgment, the act substituted summary process by execution in the nature of attachment. The defendant moved to quash the execution on the ground that it was contrary to the 7th Amendment guaranteeing trial by jury. But the act provided that the defendant might have, upon return of the execution, tendered an issue and had trial by jury, but not having availed himself of this right, it was presumed he owed the money. The court held it is not that "trial by jury shall be preserved" but that the "right of trial by jury shall be preserved," the benefits of which may be relinquished.

If the *Okely* case is advanced as authority for the proposition that trial by jury may be waived, that proposition is conceded, but why the court should make reference to "possible prejudice to the adversary party" in the light of the facts of the case, it is difficult to discern. The defendant in that case made no application for trial by jury but instead moved to quash the execution on constitutional grounds. That trial by jury may be waived goes without question. Many hundreds of cases are tried in the Municipal Court without benefit of jury because the benefit is intentionally waived. The question in this case is whether the trial judge exercised a sound legal discretion in denying defendant a trial by jury in the circumstances of this case. It is submitted that he did not, and that the decision of the Municipal Court of Appeals is correct and should be affirmed.

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